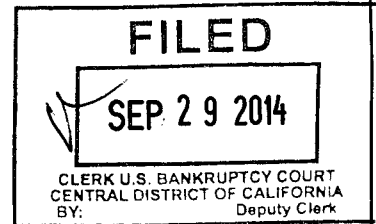


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Attorneys for Plaintiff
Kelly Furie



UNITED STATES BANKRUPTCY COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

IN RE:

RUSSELL FURIE

Debtor

Kelly Furie

Plaintiff,

vs

Russell Furie

Defendant.

CASE NO: 2:13-bk-18101 BR
Adversary NO:2:13-AP-01601 BR

**Plaintiff's Supplemental
Trial Brief**

**Date: October 22, 2014
Time: 10:00 am
Dept: 1668**

**TO THE HONORABLE BARRY RUSSELL, UNITED STATES BANKRUPTCY
JUDGE:**

Plaintiff Kelly Furie respectfully presents the following
supplemental trial brief.

Factual Background

Russell Furie and Plaintiff were married on November 2,
1996. They separated on September 26, 2009. The purpose of the

1 separation was clear, Mr. Furie wanted to protect the marital
2 assets, as the party's former landlord for A+ Teaching Supplies,
3 Octagon was suing Plaintiff and Mr. Furie wanted to protect all
4 of our assets.

5 In an effort to protect the assets, the party's filed for
6 legal separation on August 25, 2009. They entered into a
7 settlement agreement in which all of the assets were awarded to
8 Mr. Furie.

10 Under this agreement, Mr. Furie acquired all of the
11 community assets, including all interests in several profitable
12 businesses, 100% ownership in RKF Investments Inc., 100%
13 ownership interest in RK Furie Family Trust; the timeshare in
14 Laguna Beach, and most importantly the title to the family home
15 located at 26808 Terravista Court in Canyon Country.

17 Mr. Furie knew that under this agreement he was getting all
18 of the assets and he actually informed Plaintiff in writing that
19 he was aware that the agreement was unfair to Plaintiff but that
20 it needed to be done to "keep the family together".

22 Under the agreement the party's signed, Plaintiff waived my
23 right to receive spousal support in exchange for being allowed
24 to live in the family home, which was awarded to Mr. Furie,
25 until the party's youngest child, Mackenzie turned 18 or until
26 2019. This was a long-term marriage, which would have allowed
27 Plaintiff to receive spousal support for life.

1 Mr. Furie intentionally did not make the mortgage payments
2 on the home and the home has since been foreclosed upon.

3 The current order of support as ordered by the Family Court
4 is \$2,092.00. This order has been made retroactive to August 1,
5 2011 per the order of the Appellate Court. Mr. Furie is
6 currently in arrears in this support order.
7

8 **Fraud Cause of Action**

9 **11 USC §523(a)(4)**

10 11 USC §523(a)(4) excepts from discharge claims for fraud
11 or defalcation while acting in a fiduciary capacity,
12 embezzlement, or larceny.
13

14 When faced with a claim of non-dischargeability under
15 11 USC §523(a)(4), the Court does a two-step analysis.
16

17 The first step is to determine if the parties are in a
18 fiduciary relationship. To answer this question, the Court
19 will look to California law, which holds that each spouse has
20 a fiduciary relationship/obligation to each other and this
21 obligation/relationship does not terminate with separation or
22 commencement of a dissolution action. See *In Re Samuel Stanifer*
23 (1999) 236 B. R. 709.
24

25 The meaning of "fiduciary capacity" under §523(a)(4) is an
26 issue of federal law and is narrowly construed and is applied to
27 relationships involving express or technical trust
28

relationships. The "technical" or "express" trust requirements includes relationships in which trust-type obligations are imposed pursuant to statute. See *In Re Bennett*, (1993) 989 F. 2d 779-784-785; *In Re Samuel Stanifer* (1999) 236 B. R. 709.

In California the Family Code, specifically §1100(c) specifically defines the marital relationship as a fiduciary relationship.

In fact, in the case of *In Re Samuel Stanifer* (1999) 236 B. R. 709, the Court held that the "statutory scheme provided in the California Family Code establishes the type of 'fiduciary capacity' within the meaning of §523(a)(4)." *In Re Samuel Stanifer* (1999) 236 B. R. 709, 713.

In short, for purposes of Federal Courts and 11 USC §523(a)(4), the relationship between spouses is of a fiduciary relationship within the meaning of 11 USC §523(a)(4).

The second analysis that the Court undertakes is to determine if there is a viable claim, i.e. that the claim is not time barred.

Once again, in order to resolve this question, the Court will once again look to state law, here California law on the issue of fraud, more specifically, CCP § 338(d), which holds that " Within three years:...An action for relief on the ground of fraud or mistake. The cause of action in that case is not

1 deemed to have accrued until the discovery, by the aggrieved
2 party, of the facts constituting the fraud or mistake."

3 In short, under California Law, the statute of limitations
4 is a 3-year statute of limitations for a fraud cause of action.

5 It appears that Defendant is arguing in his declaration and
6 in his trial brief that the statute of limitations on the fraud
7 cause of action has expired.
8

9 To support this argument, Defendant refers the Court to
10 Family Code §2122, which allows one year to set aside a voidable
11 judgment. In this case, Plaintiff is not challenging the
12 judgment as being void or voidable.
13

14 Plaintiff is simply asking the Court to recognize that a
15 debt was created by intentional misrepresentations of Defendant
16 to Plaintiff regarding her rights for spousal support (common
17 law fraud).
18

19 Note that this case is not a motion to set aside the
20 judgment. In deed, it is Plaintiff's position that the judgment
21 is valid and enforceable. Thus, to the extent that Defendant
22 promised that Plaintiff and the kids would have a home fully
23 paid for, for a period of approximately 10 years, needs to be
24 enforced, and to the extent that this promise to Plaintiff was
25 obtained through common law fraud by Defendant, then it creates
26 a non-dischargeable debt and the statute of limitations is 3
27 years per CCP §338(d).
28

Child Support

11 USC §523(a) (5)

It should be noted that Defendant has not addressed this issue in either his declaration or trial brief. However, for purposes of simplicity for the Court, we are re-stating the law on this issue here.

11 USC §523(a)(5) exempts from discharge claims for domestic support obligations. This includes support arrearages.

Defendant is obligated to pay child support at the rate of \$2,092.00 per month retroactive to August 1, 2011. Defendant is currently in the arrears in the amount of approximately \$30,197.72 and said amount is currently increasing.

11 USC §523(a)(5) exempts from discharge child support obligations this includes any and all arrearages for support. This law is clear. The amount of support ordered is not ambiguous or open to "interpretation". The Court order for support is clear and Mr. Furie is deliberately refusing to pay the Court ordered support despite his statements that he can afford to do so.

Attorney Fees

11 USC §523(a) (15)

Defendant has not cited any law to this Court contradicting in any way the law cited in Plaintiff's trial brief. Nor is he

1 arguing that he cannot afford to pay this expense that was duly
2 ordered by the family law court.

3 Plaintiff has met her burden of proof to have this judgment
4 for attorney fees declared non-dischargeable pursuant to 11 USC
5 §523(a)(15) and Defendant has not argued against this fact nor
6 present any evidence to contradict this fact.
7

8 Thus, it is clear. Plaintiff should prevail on this issue
9 and the debt should be declared non-dischargeable.

10 **Transfer Of RKF Investment**

11 **11 USC §727(a)(2)(A) .**

12 Once again Defendant has not cited any law to this Court
13 contradicting in any way the law cited in Plaintiff's trial
14 brief
15

16 In this case, Mr. Furie was found to have owned a business
17 known as RKF Investments. This asset was found by the family
18 court to have cash reserves of approximately \$105,000.00. This
19 asset was transferred to Mr. Furie's father for no value. This
20 transfer was also made within one year of this petition being
21 filed.
22

23 This was found to be a valuable asset that was and is
24 necessary for Mr. Furie to pay his court ordered child support.
25 Instead of using the funds from this asset to pay his court
26 ordered support he has chosen to transfer the asset to his
27 father. This was done to avoid paying his creditors.
28

Moreover, the Family Court has ordered Mr. Furie to deliver to Plaintiff the promissory note for the sale of this asset. Mr. Furie has completely refused to comply with this order.

The transfer of the asset to his father, a very valuable asset was done on September 18, 2012. This bankruptcy was filed on March 28, 2013.

The burden of proof on an objection to discharge under § 727(a)(2) is preponderance of evidence. See *Grogan v. Garner* (1991), 498 U.S. 279.

In order to prevail Ms. Furie must show that Mr. Furie had the intent to either hinder or delay his creditors. Intent may be inferred from surrounding circumstances. The surrounding circumstances include the various "badges of fraud" that constitute circumstantial evidence of intent. A course of conduct may also be probative of the question of intent. In re *Beverly* (B.A.P. 9th Cir. 2007) 374 B.R. 221, 243 aff'd in part, dismissed in part, (9th Cir. 2008) 551 F.3d 1092

Mr. Furie was ordered to turnover the promissory note that he received for the "transfer" of the asset RFK Investments to Ms. Furie. Mr. Furie's continued refusal to comply with this Court's order is clear evidence of his intent to hinder and delay Ms. Furie's ability to satisfy the debt owed to her of past due child support.

Moreover, the transfer of this asset with cash reserves of \$105,000 was transferred approximately 6 months before the filing of this bankruptcy.

It is clear the transfer of this asset was and is a detriment to his creditors and he should be denied a discharge.

Conclusion

Based upon the foregoing, Plaintiff respectfully requests that judgment be entered in her favor.

Respectfully submitted:

Date: September 24, 2014 LAW OFFICES OF ROSENTHAL & ASSOCIATES

By: Lisa F. Rosenthal
Attorney for Plaintiff
Kelly Furie

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:
21601 VANOWEN ST. SUITE 208 CANOGA PARK, CA. 91303

A true and correct copy of the foregoing document entitled (specify): PLAINTIFF'S SUPPLEMENTAL TRIAL
BRIEF

will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (date) _____, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☐ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On (date) 9/26/14, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

RUSSELL FURIE 26766 CLAUDETTE STREET, SUITE 415 CANYON COUNTRY, CA. 91351

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (date) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

9/26/14
Date

CLAUDIA ESPINOZA
Printed Name


Signature